(34)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.37 of 2002

APPELLANT: Mahadev
(In Jail)

-Versus-

RESPONDENT: State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

I agree.

Sd/-
Sunil Kumar Sinha
Judge

POST FOR PRONOUNCEMENT OF JUDGMENT ON 31ST OCTOBER, 2007

Sd/-
E
31-10-2007

(35)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.37 of 2002

APPELLANT: (In Jail)	Mahadev, S/o Kariyaram Chandra, Aged about 45 years, R/o Village Singhra, Tehsil: Sakti, Distt. Janjgir, Police Station: Malkharouda (Chhattisgarh)
-Versus-	
RESPONDENT:	State of Chhattisgarh, Through District Magistrate, Janjgir (Chhattisgarh)

Present: -

Shri Vishnu Koshta, Advocate: For the appellant.

Shri Ashish Shukla, Addl. Public Prosecutor: For the State/respondent.

DIVISION BENCH*: -

HON'BLE SHRI L.C. BHADOO AND

HON'BLE SHRI SUNIL KUMAR SINHA, JJ.

J U D G M E N T

(Delivered on 31st October, 2007)

The following judgment of the Court was delivered by *L.C. Bhadoo, J.*: -

1. By this appeal under Section 374 (2) of the Cr.P.C. appellant Mahadev has questioned legality and correctness of the judgment of conviction and order of sentence dated 20th December, 2001 passed by the Special Judge, Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, Bilaspur, in S.T. No.62/2001 whereby learned Special Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the I.P.C., sentenced him to undergo imprisonment for life & to pay a fine of Rs.500/-, in default of payment of fine to further undergo S.I. for 3 months. However, learned Special Judge acquitted the accused/appellant of

the charges under Sections 3(1)(i) & 3(2)(v) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. Case of the prosecution, in brief, is that Yadram, son of present accused/appellant Mahadev, committed rape on Guddi, aged about 16 years, as a result of which she became pregnant & delivered a male child on 26th August, 2000, that boy was named as Hari Prasad. When Guddi Bai was pregnant by 7 months, a Panchayat was convened in the village, but the accused/appellant refused to marry Guddi Bai with his son. Therefore, Guddi Bai lodged a report for commission of rape. After investigation, charge sheet was filed against Yadram, son of the appellant. In the morning of 27-1-2001 Guddi Bai went to brush her teeth & her son Hari Prasad, aged about 5 months, was sleeping on the cot. When she returned after brushing her teeth, she saw accused/appellant Mahadev at the gate of the house running away. Thereafter, when she saw her son, smell was emanating from his mouth, therefore, she raised cries that Mahadev has administered poison to her son. She disclosed this fact to neighbour Sonai Bai. She rushed to inform her mother, as she was working in a house which was 2-3 houses away from their house. She informed her mother. The father of Guddi was not at residence, therefore, mother of Guddi went to call her husband Dujram and informed him about the incident. Thereafter, they took Hari Prasad to the doctor and from there to the Police Station. He died in the hospital.

3. Guddi Bai lodged a report (Ex.P/5) in the Police Station Malkharoda. Head constable returned from the hospital and gave written communication of the doctor that Hari Prasad, a boy aged about 5 months, is admitted in the hospital in serious condition and treatment is being given. It appears that some poisonous substance has been administered to him, which was written in Rojnamcha, copy of the same is Ex.P/7. Therefore, on the same day merg intimation Ex.P/18 was given by Hawaldar on being informed by the hospital, based on

that, first information report Ex.P/19 was registered. The investigating officer prepared inquest Ex.P/20 on the body of Hari Prasad. The body of Hari Prasad was sent to the Primary Health Centre, Malkharoda under Ex.P/15 where Dr. R.P. Kurre conducted postmortem on the body of Hari Prasad. He opined that cause of death is cardio respiratory arrest due to organo phosphorous poisoning. Death is homicidal in nature. He prepared postmortem report Ex.P/16. Viscera of Hari Prasad were preserved, same were sent to the Forensic Science Laboratory, Sagar from where report Ex.P/24 was received.

4. After completion of the investigation, charge sheet was filed in the Court of Additional Chief Judicial Magistrate, Sakti, who in turn committed the case to the Sessions Judge, Bilaspur, from where learned Special Judge received the case on transfer for trial.

5. The prosecution in order to establish the charge against the accused examined 14 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C. in which he denied material appearing against him in the prosecution evidence, stated that he is innocent and has been falsely implicated in the crime. He further stated that Guddi demanded Rs.1 lakh. She said that otherwise she will implicate him in a false case.

6. Learned Special Judge after hearing learned counsel for the respective parties, convicted and sentenced the accused/appellant as aforesaid.

7. We have heard Shri Vishnu Koshta, learned counsel for the appellant and Shri Ashish Shukla, Additional Public Prosecutor for the State/ respondent.

8. Shri Koshta argued that in this case there is no direct or ocular evidence regarding complicity of the accused/appellant in the crime in

question. He further argued that in this case PW-2 Guddi Bai is the only witness, who has stated that she saw the accused running away. She did not see the accused administering poison to Hari Prasad nor any poisonous substance or container has been seized from the accused/appellant, therefore, based on the single testimony of PW-2 Guddi Bai, which is not reliable, the accused/appellant has wrongly been held guilty. He also argued that even Sonai Bai (PW-5) with whom Guddi Bai said to have been talking at the time when she saw the accused running away, has not corroborated the evidence of (PW-2) Guddi Bai. Moreover, PW-2 Guddi Bai lodged a report against son of the accused/appellant namely, Yadram, for commission of offence under Section 376 of the IPC, in that case also Yadram has been acquitted. Therefore, the accused has been falsely implicated.

9. On the other hand, Shri Ashish Shukla, learned Additional Public Prosecutor supported the judgment of the trial Court.

10. Having heard learned counsel for the parties, we have perused record of the trial Court. It is admitted position that in this case there is no ocular or direct evidence in order to connect the accused with the crime in question. The whole case rests on the circumstantial evidence. The Apex Court in the matter of **Sharad Birdhichand Sarda V. State of Maharashtra**[1] while considering murder by poison or suicide has held in para-165 of the judgment that:-

> "So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:
>
> (1) there is a clear motive for an accused to administer poison to the deceased,
>
> (2) that the deceased died of poison said to have been administered,

[1] (1984) 4 SCC 116

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased."

11. In the matter of **Bhupinder Singh V. State of Punjab**[2] the Hon'ble Apex Court has doubted the availability of the above third circumstance as necessary to establish the case of murder by poisoning. Paragraphs 25 & 26 of the above judgment are reproduced hereunder:

> "25. We do not consider that there should be acquittal or the failure of the prosecution to prove the possession of poison with the accused. Murder by poison is invariably committed under the cover and cloak of secrecy. Nobody will administer poison to another in the presence of others. The person who administers poison to another in secrecy will not keep a portion of it for the investigating officer to come and collect it. The person who commits such murder would naturally take care to eliminate and destroy the evidence against him. In such cases, it would be impossible for the prosecution to prove possession of poison with the accused. The prosecution may, however, establish other circumstances consistent only with the hypothesis of the guilt of the accused. The court then would not be justified in acquitting the accused on the ground that the prosecution has failed to prove possession of the poison with the accused.
>
> 26. The poison murder cases are not to be put outside the rule of circumstantial evidence. There may be obvious very many facts and circumstances out of which the court may be justified in drawing permissible inference that the accused was in possession of the poison in question. There may be very many facts and

[2] (1988) 3 SCC 513

circumstances proved against the accused which may call for tacit assumption of the factum of possession of poison with the accused. The insistence on proof of possession of poison with the accused invariably in every case is neither desirable nor practicable. It would mean to introduce an extraneous ingredient to the offence of murder by poisoning. We cannot, therefore, accept the contention urged by the learned counsel for the appellant. The accused in a case of murder by poisoning cannot have a better chance of being exempted from sanctions than in other kinds of murders. Murder by poisoning is run like any other murder. In cases where dependence is wholly on circumstantial evidence, and direct evidence not being available, the court can legitimately draw from the circumstances an inference on any matter one way or the other."

12. Now, we shall proceed to examine the evidence adduced by the prosecution in the light of principles of law laid down by the Hon'ble Apex Court in the aforesaid judgments to ascertain whether in the present case the four important circumstances have been established or not.

- **Whether there is a clear motive for the accused to administer poison to the deceased?**

13. As far as this circumstance is concerned, PW-2 Guddi Bai has stated that Yadram, son of the appellant, had committed rape on her, as a result of which she became pregnant. She delivered a child on 26th August, 2000. In cross-examination, she has stated that Panchayat was convened when she was pregnant by 6-7 months, in that Panchayat Mahadev was called, but he did not appear. PW-3 Bharatlal is the Sarpanch of the village, who has stated that child of Guddi was through Yadram, as she became pregnant on account of physical

relationship with Yadram. Panchayat was convened in which Mahadev was called. When Yadram was called, he was not at his residence. He asked Mahadev to keep Guddi but he denied and said that he will fight the case. Panchanama Ex.P/5 was written. Notice Ex.P/6 was given. PW-6 Bhuri Bai, mother of Guddi, has corroborated the above evidence that Guddi became pregnant through Yadram, son of the accused/appellant. Similar is the evidence of PW-7 Dujram, father of Guddi. It has also come in the evidence that Guddi lodged a report against Yadram in which charge sheet was filed for commission of offence under Section 376 of the IPC against Yadram, however, he has been acquitted. Therefore, in view of the above evidence, it is established that on account of physical relations with Yadram, son of the accused/appellant, Guddi became pregnant & she delivered a male child namely, Hari Prasad, who was aged about 5 months at the time of the incident. Even Panchayat was convened in which Mahadev was asked to keep Guddi but he refused. It is admitted position that Guddi is SC lady, therefore, she was not married. There was pressure on Mahadev to keep Guddi, therefore, there was motive behind the crime to eliminate the boy.

- **Whether the deceased died of poison said to have been administered?**

14. As far as this circumstance is concerned, PW-2 Guddi Bai has categorically stated that on 27th January, 2001 when she was returning after brushing her teeth, she saw Mahadev at the gate of their house while running away. Immediately, she saw that there was smell from the mouth of her child. She raised cries that Mahadev had administered poison. The boy was immediately taken to the police & from there to the hospital. He died on account of poisoning. In Rojnamcha report Ex.P/5 which was lodged by her at 11.10 a.m. in the Police Station Malkharoda, she has categorically stated that in the morning she saw Mahadev running away. She has doubt that he has administered something to her child, as a result of which he has

become sick. PW-6 Bhuri Bai, mother of Guddi, has also stated that Guddi immediately came and informed her about the incident that Mahadev has administered poison to her child. When she returned to the house, she saw that froth was coming out from the mouth of Hari Prasad. PW-5 Sonai Bai has also stated that on the fateful day when Guddi returned to her house after brushing her teeth, she raised cries that somebody has administered poison to her child. The boy was taken to the hospital. PW-11 Dr. R.P. Kurre has stated that on 27-1-2001 he conducted postmortem on the body of the child namely, Hari Prasad, aged about 5 months. He noticed that saliva was coming out from the nose and mouth. Froth was coming out from the mouth which was dried up. There was erosion of mucous membrane of oesophagus. Blood collected in both the chambers of heart. Fluid in the stomach was stinking just like kerosene oil. Viscera and clothes of the deceased were preserved for chemical examination. He was of the opinion that the deceased died on account of administration of poison. PW-13 Nandkishore Mishra, investigating officer, has also stated that in the Government Hospital, Malkharoda he seized one bed sheet under Ex.P/8 on being produced by Guddi. There was mark of fall of liquid on that bed sheet. PW-10 D.R. Achla, I.O., has stated that he seized one plastic container containing blood, clothes of the deceased and one glass bottle under Ex.P/11. Viscera were sent for chemical examination to the Forensic Science Laboratory, Sagar under the letter of Superintendent of Police dated 1-3-2001. Report of viscera Ex.P/24 was received from FSL, Sagar in which it has been mentioned that in viscera of the deceased as well as bed sheet seized by the police contents of carbonate poison (Begon) were found. Therefore, in view of the above circumstantial evidence, it is established that Hari Prasad died on account of poisoning.

- **Whether the accused had the poison in his possession?**

(113)

15. As far as this circumstance is concerned, in fact, the prosecution has not been able to adduce any evidence to establish the fact that the accused was in possession of the poison. Even search of the house of the accused was conducted by the police. Search memo Ex.P/2 was prepared but nothing was detected in the house of the accused regarding poison in his possession or any container of the poison in his possession. Therefore, the prosecution has failed to establish this circumstance.

- **Whether the accused had an opportunity to administer the poison to the deceased?**

16. As far as this circumstance is concerned, PW-2 Guddi Bai has stated in her evidence that on 27-1-2001 when she returned after brushing her teeth, she saw that the accused was running away from the house after administering the poison to her son. There was smell emanating from the mouth of Hari Prasad, therefore, she raised cries that accused Mahadev had administered poison to her son. She disclosed this fact to Sonai, sister-in-law, that Mahadev had administered poison to her son, thereafter she went to call her mother and father. In cross-examination, she has stated that her son was sleeping when she went to brush her teeth. She was at a distance of 25-30 ft. There is wall between courtyard and Kola where she went to brush her teeth. She saw Mahadev at the door. He was about to cross the door, by that time he did not cross the door. He was in the Parchi when she raised the cries, nobody came there. In para-15, she has stated that whatever stated above that she raised cries when she saw Mahadev is not correct. She raised cries after she saw her son. Therefore, in fact, it appears from her evidence that Mahadev had already left, thereafter she saw her son, thereafter she raised cries. In the first instance, she lodged report Ex.P/5 in the police station at about 11.10 a.m. in which she has mentioned that today Mahadev went in the courtyard of the house that is why she is doubting that he must have administered something to her son as a result of which her son

has become sick. PW-5 Sonai Bai with whom she has stated to be talking and to whom she informed that Mahadev had administered poison to her son, has turned hostile. She has stated that Guddi was washing her mouth, thereafter she returned to her house. As soon as she returned to her house, she started crying that somebody has administered poison to her son but she did not take the name of anybody.

17. It is settled position that evidence of hostile witness cannot be rejected en bloc. The Court would be slow to act on his testimony and would look for corroboration. But the Court has at least to be aware that prima facie, a witness who makes different statements at different times has no regards for truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same. The Court should be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence. The said view has been taken by the Apex Court in the matter of **State of Rajasthan V. Bhawani & another**[3]. She has not corroborated the evidence of PW-2 Guddi Bai to the extent that Guddi Bai raised cries that Mahadev has administered poison.

18. Question remains as to whether testimony of single witness namely, PW-2 Guddi Bai inspire full confidence of the Court in order to reach conclusive conclusion that Mahadev in fact administered poison to Hari Prasad. The evidence of PW-2 Guddi Bai is not that cogent and clear in order to arrive at conclusive conclusion that Mahadev, in fact, administered poison for the reason that in the first instance, even as per the evidence of PW-2 Guddi Bai, she had not seen him administering poison. As far as her evidence that she saw him while he was going out of the gate of the house is concerned, even Mahadev was not seen nearby Hari Prasad. In the first instance, she has

[3] AIR 2003 SC 4230

stated that she raised cries after seeing Mahadev but in cross-examination she has stated that in the first instance, she saw her son. When she saw that there was smell from his mouth, then she raised cries that Mahadev had administered something to her son. She has not stated that when she saw her son, any saliva was coming out from nose or mouth of the deceased or any froth was coming out of the mouth of the deceased. She has simply stated that she saw that smell was coming out from the mouth.

19. Further question which comes up for consideration is that smell of Begon is not that which can be noticed without taking her mouth near the mouth of Hari Prasad and going near to Hari Prasad, it was not possible for her to notice smell of Begon. She has not stated that she took her mouth near the mouth of Hari Prasad to notice smell. Therefore, based on testimony of this witness, it is difficult to reach conclusive conclusion that Mahadev had, in fact, an opportunity to administer poison to the deceased.

20. For the foregoing discussion, in the first instance, no poisonous substance or any container of the poison has been seized from the possession of the appellant in order to establish that he was in possession of poisonous substance. Moreover, PW-2 Guddi Bai has not been able to say with certainty that in fact she saw the appellant administering poison to her son, even if her evidence is taken on its face value, even then she saw Mahadev while going out of the gate. Moreover, neighbour PW-5 Sonai Bai with whom Guddi is said to have been talking has also not corroborated the evidence of this witness to the extent that she raised cries that Mahadev had administered poison to her son. Therefore, the prosecution has not been able to establish these two circumstances beyond reasonable doubt, hence, explicit reliance cannot be placed on the evidence of PW-2 Guddi Bai in order to reach to the conclusion that the appellant had administered the poison. He is entitled for benefit of doubt.

21. In the result, the appeal succeeds. Conviction and sentence imposed upon the accused/appellant under Section 302 of the I.P.C. are set aside. He is acquitted of the said charge. He is in detention since 2001, thereby he is in detention for more than 6 years, therefore, he be set at liberty forthwith if not required in any other case.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

Barve